

A Whole New World: Best Practices for Navigating E-Discovery

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Discovery has never been a simple process for organizations, even in the "old days" when discovery generally entailed gathering piles of documents into large boxes and wading through them by hand. Information long ago evolved from print documents to electronic formats, which has created both challenges and opportunities—challenges in that the sheer volume of information to be "discovered" is massive, and opportunities in that technology can simplify the process of evaluating and searching through electronic documents to find required information.

As discovery has moved beyond print documents to the electronic environment, a new term has emerged: e-discovery. In his report "Q&A: eDiscovery Fundamentals for Content & Collaboration Professionals," Brian Hill of Forrester Research defines e-discovery as "the iterative process of identifying, collecting, preserving, preparing, reviewing, and potentially producing electronically stored information (ESI) to support litigation, investigations, and regulatory proceedings."

In 2006, the U.S. Federal Rules of Civil Procedure (FRCP) took effect and addressed e-discovery, including the process for preparing and producing ESI and for resolving related disputes. Unfortunately, 5 years later, confidence in their e-discovery capabilities is low for most organizations, according to Forrester's research. "Only 16% of records management stakeholders and 28% of message archiving stakeholders report that they are 'very confident' that if challenged their organization could demonstrate that their ESI is accurate, accessible, and trustworthy." According to Hill, concerns stem from a number of sources: complications in aligning multiple internal stakeholders (e.g., IT, legal, records management, compliance, and others); an increase in litigation; a myriad of technology options (e.g., on-premise software, appliance, cloud, and hybrid approaches); vendor selection complexity in an extensive field of e-discovery providers (Forrester estimates that there are more than 600 vendors that address different components of e-discovery); the need for extensive collaboration with outside counsel (and other third parties); rising costs to support the e-discovery process; and requirements to track changing case law.

Sarah Carter is vice president of marketing at Actiance (formerly FaceTime Communications) in Belmont, Calif. She says there are two primary challenges that organizations face when it comes to e-discovery. First, there's the broad diversity of data and the formats it may be in. "It's not necessarily just about email anymore," she points out. "It's records of social networking conversations and blogs and wikis, whether they're internal or external." The second big issue is the sheer amount of data. "There is not enough storage on the planet to store all of the data we are required to store," she says.

In fact, International Data Corp. (IDC) predicts that the amount of digital data created in a year will be 35 zettabytes (ZB) by the year 2020—that represents a stack of CDs that would reach halfway to Mars.

Uncharted Territory

Barry Willms is senior attorney and discovery process architect at Counsel on Call (with offices in Atlanta; Boston; Chicago; Memphis, Tenn., and Nashville, Tenn.) and a frequent contributor to Counsel on Call's blog Lawdable (www.lawdable.com), where he writes about e-discovery trends.

"The traditional, linear, print it all out and put it in a box days are gone," says Willms. In the old days, he notes, more people communicated via telephone and only committed really "important" information to written form. Formal memos were created judiciously compared to the use of email today. That proliferation of online information isn't necessarily a bad thing, he points out. "You have a better idea of what you want to look at because you can search it. When you had paper in a box, all you knew was it said 'accounts receivable' on the outside label or 'John Smith's file'-now you know who it came from, and you can highlight the words you're searching for-all in a much more efficient manner."

These new methods of communication require new processes and approaches, says Dean Gonsowski, associate general counsel at Clearwell Systems in Mountain View, Calif. In an electronic age, the biggest misstep that many companies take, says Gonsowski, is trying to handle discovery just like they did in a nonelectronic age. "When I practiced as a litigator 15 or so years ago, it was paper-based and we went through it in a linear-based fashion. In this electronic discovery world everyone has tried to mirror that process. ... As we've continued to evolve, folks have seen that treating it the same way as paper doesn't make much sense," he says. Technology provided by companies such as Clearwell can help, but companies need a plan for using that technology effectively, he says. "Organizations need to have a plan for how they want to use the technology and then be able to institute the change management protocols within the organization so the folks that are there start to use the tools in a different fashion."

But not every organization necessarily needs to be concerned proactively about e-discovery. "The first step you need to take is to look at your litigation profile," says Gonsowski. "If I'm a mid-sized service company and don't have much litigation other than periodic HR litigation, I may be able to say, on an episodic basis, that I'm better off when I do have e-discovery to go to my law firm or vendor that specializes in this and handle it as a one-off or a series of one-offs over time." On the other hand, he notes, "If I'm in a regulated industry or pharma, for instance, and have significant litigation, then the profile changes."

Still, according to "Content Archiving Market Trends, 2010-2013" from Osterman Research, 69% of organizations surveyed said they had been ordered to produce employee email for litigation. When this happens, they need to respond effectively. That's where best practices come into play.

Discovering Best Practices

Nolan Goldberg is senior counsel, IP and technology, with Proskauer Rose in New York City. Goldberg is on the firm's e-discovery committee and is an electrical engineer. The concept of best practices in e-discovery is complex, says Goldberg, because of the sheer variety between companies and the cases with which they're involved. "Each client is different in terms of the networks and documents they have, how the networks are laid out, what kind of systems they have, what kind of documents they have, what in-house e-discovery tools they have, if they're located in just the U.S. or also in Europe, which raises all kinds of cross-border conflict issues."

Randy Burrows agrees, adding that the level of understanding among clients also varies widely. Burrows is VP and general manager of Xerox Litigation Services. "There are certainly companies that get it better than others-some of it just has to do with who they are and how much litigation they have," he says. "There's a broad variation between our clients in terms of not only levels of sophistication, but levels of desire. Some clients are sort of happy pushing it all out and having someone take care of it. Others are very, very actively involved."

Still, there are some things that organizations can do to simplify the process and ensure that they are realizing the advantage of e-discovery.

Record Retention Policies

"I don't know if I'm just listening differently, but right now the big buzzword is workflow," says Burrows. "There's been a lot of advancement in tools and certainly in features, but what we've found and what I think our clients are finding is that they weren't completely taking advantage of them." What organizations need, says Burrows, is help with workflow—"how to take these various tools and put them in the right place so they're actually reducing the data and ensuring they're not missing things."

While the concept is certainly not new, and definitely not driven by e-discovery, a good records retention policy is extremely important, says Willms.

"The percentage of companies that have a good records retention policy, particularly as it relates to electronic information, is still too low," he says. "That's an area where more and more attention is going to be focused."

"It's important to manage data in a way that contemplates a data request," agrees Kelly Kubacki, a staff attorney with Kroll Ontrack. That means, she says, "creating and maintaining records management protocols that systematically retain data necessary for legal and business purposes and actually disposing of the rest of the unneeded data, rather than just retaining everything."

Of course, effectively managing data requires that organizations know what kind of data they are dealing with. Gagan Bhatia is worldwide product manager, information management, software, at HP. He recommends conducting surveys and interviewing users by department or function to understand how information is currently cataloged and indexed to help break down the silo effect of storing information. "This will also help develop classification standards and local procedures that link with the overall governance package," he says.

Communication and education of end users is another best practice, says Bhatia. "Establishing a guide or training to make sure all employees are knowledgeable about their role in records management and what data may be called into question safeguards against accidental deletion of important documents."

As part of records retention practices, companies should strive to "save less," say Carter and others. Having a good information management program in place can help to ensure that there is less information to retain, she says.

"What we tell our clients—most are corporate clients—is to review less data and to review it faster," says Willms.

Choosing the Right Tools

As demand and need grow, so do the multitude of technology options that organizations and their legal counsels have to choose from when it comes to e-discovery.

"The variety is enormous," says Willms. That variety can be overwhelming, causing many organizations to look outside for advice and assistance.

"I find that most people, if confronted with an e-discovery project without a process in place, will call somebody they rely on," says Willms. That might be outside counsel. "We get calls all the

time from clients or potential clients," he says, adding that Counsel on Call considers itself to be "tech agnostic." "We try to find the best technology that the client might need in a particular situation. It may not be the same thing every time."

Choosing the right tools, notes Carter, can help organizations review less and do it faster. "There are a host of information technology providers that can help," she notes. Certainly, choosing among the various options can be challenging, but Carter recommends working with analysts and asking them for guidance, talking to other companies about the tools they may be using, and looking at two or three different solutions to compare features and options.

Forums such as LegalTech-held each January in New York and each June in Los Angeles-can be a good source of information on technology options. Goldberg also points to The Sedona Conference, a series of think tanks consisting of leading jurists, lawyers, experts, and consultants on antitrust law, complex litigation, and intellectual property rights, as a good source of information. "They're pushing the conversation forward," he says, noting that case law is evolving very rapidly in this area.

Being Proactive

The heat of litigation is a horrible time to run an e-discovery project, says Goldberg. "You're under pressure, there are all kinds of deadlines from the court, and it always ends up more expensive than it needs to be. Litigation readiness simply involves being prepared-understanding the data that you have, where it's stored, and the best way to collect it. Then you put it aside-when you're sued you break out your plan, enact your plan, and monitor the application of the plan. It's really applying a project management mentality for e-discovery," he says.

Elizabeth Cohee is an attorney in Oakland, Calif., and a continuing legal education lecturer in the area of e-discovery, where she focuses on the penalties for failure to execute effective e-discovery. "All litigation attorneys are aware of the [Zubulake v. UBS Warburg] case, where sanctions for failing to properly carry out their e-discovery responsibilities ultimately cost the defendant \$29.5 million," she says.

"Companies need to communicate with all employees long before a complaint is filed-preferably in their employee operations manual-what a litigation hold is and what is expected of employees in the event of litigation," recommends Cohee. At the time of an actual complaint, the company should communicate with relevant employees, in writing, about their specific importance in the suit and about the need to preserve data, she says. "It would also be wise to receive a written acknowledgment of that notice." Impacted employees should receive reminders at regular intervals to not destroy documents. In addition, she suggests, "The company will also need to personally interview each relevant employee about pertinent information that might [be] in the employee's possession and beyond the reach of the employer-data on home computers, on BlackBerries, on thumb drives, in personal email accounts. All of this data may be discoverable, and the failure to produce it may be costly."

Discovery Plans-A Collaborative Process

Creating discovery plans and sharing those plans with the opposing counsel is another best practice that may seem somewhat counterintuitive, says Kubacki, who advises that companies "put down the adversarial tone in the discovery process and engage in meeting confirmation conferences. We're seeing courts use those more." The message from the courts has been consistent, she says: "They want counsel to move through discovery so the merits of the case can be adequately addressed."

Goldberg agrees, adding that it's also important to be sure the court understands the rationale behind discovery decisions. "The idea is to document your effort so that when the court sees the decisions you made, the court will understand why you made the decisions and what your rationale was. Even if they disagree, they'll understand you made an effort to comply." Where companies can get into trouble, he says, is when the court thinks they're purposefully not meeting their obligations.

Finally, discovery processes and technology should be continually evaluated, recommends Bhatia. "Create an evaluation system with ongoing monitoring, surveys and interviews with management and other stakeholders, as well as checks with operations staff to determine how your system is meeting changes to organization needs."

Blazing a Trail

As experience with e-discovery has increased, the chasm has widened between "those in the know" and those just becoming familiar with this concept of e-discovery.

"There are a whole bunch of people who have been doing this for a long time," says Willms. "Our best clients are the most knowledgeable of the in-house people," he says. "They know that we can provide them savings or we can provide them the expertise that's needed to cull down the data or review it faster."

At the other end of the spectrum, he says, are people who are still trying to become informed. "They have to get educated," he says. "They just have to understand the terminology—they don't have to understand the details of the technology or process, but they need to think about how it might impact their overall budget. The ones that don't pay attention are the ones that end up paying more."

Ultimately, says Kubacki, effective e-discovery is "a three-legged stool composed of people, process, and technology." If one of these legs is not functioning properly, then inevitably the stool is going to fail.